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No. 80-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF PHILADELPHIA, *Petitioner,*

v.

SUSAN JANE B. GILFILLAN, *et al., Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the establishment clause of the First Amendment to the United States Constitution forbid the government's designing, constructing, and furnishing, at taxpayers' expense, a specially designed dais, fitted with a Christian cross, for a Roman Catholic Mass, attendance at which was exclusively controlled by the Church?

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CITY OF PHILADELPHIA, *Petitioner,*

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF IN OPPOSITION

Respondents Reverend Walter Weider, Reverend Bryan Kopke, Bertha R. Smith, Herbert S. Herrman, Gerard H. Bye, Antoinette Montanaro, Elizabeth M. Calter, Martha Walker Miln, Paul H. Fox, and Janice Schulte (hereafter sometimes referred to as Intervening Plaintiffs for identification purposes)[1] respectfully re-

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[1] The above-named individuals were permitted to intervene as parties plaintiff in the District Court pursuant to Federal Rule of Civil Procedure 24(a) [See memorandum of District Court reported at 480 F.Supp. 1161 (E.D. Pa. 1973)(3a). The original plaintiffs are Susan Jane B. Gilfillan and Reverend Mary Ann Forehand. The Court also granted defendants' unopposed motion to join the American Civil Liberties Union and the National Ministries, American Baptist Churches in the United States, as parties plaintiff. *Id.* This brief is filed only on behalf of the intervening plaintiffs.

quest that this Court deny the Petition for Writ for Certiorari that seeks review of the decision of the United States Court of Appeals for the Third Circuit in this case.

SUMMARY OF ARGUMENT

This suit was filed to prevent the City of Philadelphia from furnishing a dais and other facilities at taxpayers' expense to the Roman Catholic Archdiocese of Philadelphia, the sole use of which was to be the celebration of a Roman Catholic Mass by Pope John Paul II.

This Court has fashioned a tripartite test as a guideline to identify instances in which the objectives of the establishment clause have been impermissibly impaired. In order to pass constitutional muster a governmental act (1) must reflect a clearly secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoids excessive governmental entanglement.

The City failed all parts of the three-prong test. In addition, the City's actions clearly ran counter to the basic objectives of the establishment clause. The City's claim that its actions were validated because of the free exercise accommodation principle is also not well taken because the actions of the City crossed over the line into the area of impermissible religious sponsorship, financial support, and entanglement.

COUNTER-STATEMENT OF THE CASE

In September of 1979 Pope John Paul II announced that he would undertake a "pastoral mission" to the United States which would include a stop in Philadelphia. City officials held a series of meetings with

the leaders of the Roman Catholic Archdiocese of Philadelphia to prepare for the Pope's visit.

The City, with the approval of the Archdiocese, designed, built and paid for, at taxpayers' expense, a dais cylindrical in shape, 28 1/2 feet high and 144 feet in diameter. Fifty-seven steps, 60 feet wide, extended 110 feet from the platform to the street. On the platform was a 16-step, four-sided pyramid, 45 feet on a side and 14 feet high. On this pyramid was another small, five-step pyramid upon which was placed a throne used by the Pope. The top of the large pyramid and portions of the steps were red-carpeted by the City. The City also erected in one corner a white 36-foot high cross.

The City purchased and encircled the dais with approximately $50,000 worth of shrubbery and yellow chrysanthemums. The City rented 20,000 chairs for seating guests exclusively selected by the Archdiocese. The City also supplied a sound system at a cost of more than $50,000 and constructed a separate platform for the use of a 360-voice choir.

On October 3, 1979, Pope John Paul II performed a Holy Mass on the specially prepared dais. Only Roman Catholic clergy were permitted on the platform.

The dais was illuminated by the City for six days prior to the holding of the papal Mass and for more than one week after the sermon. The dais was used for no other function. The City had provided a separate platform at the airport for the civil ceremony greeting the Pope upon his arrival.

REASONS WHY THE WRIT SHOULD BE DENIED

By requiring that the Archdiocese . . . reimburse the City for the impermissible expenditures, we in no

> way penalize the Archdiocese. Rather, we are adhering to the venerable principles of neutrality. For if the City can spend in excess of $200,000 directly in support of the Pope's Mass, it can devote half of its budget to some other group next year. As Madison did not accept the "arrogant pretension" that "the Civil Magistrate is a competent Judge of Religious truth" . . . we cannot accept the City's decision to support a particular sect. . . .

Gilfillan v. *Philadelphia*, _____ F.2d _____ (3rd Cir. 1980) (38a).

The Judgment Of The Third Circuit Is Clearly Consistent With The Teachings Of This Court Concerning The Application Of The Establishment Clause Of The First Amendment And Does Not Conflict With The Holdings Of Other Circuits.

Although many perplexing questions in constitutional law have been presented by cases arising under the establishment clause of the First Amendment to the United States Constitution — "Congress shall make no law respecting the establishment of religion" — this Court has fashioned a three-pronged test by which to judge the constitutionality of a statute or governmental act: 1) In order to pass constitutional muster a statute or governmental act must reflect a clearly secular purpose; 2) it must have a primary effect that neither advances nor inhibits religion; and 3) it must avoid excessive government entanglement with religion. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-14 (1971); and *Tilton* v. *Richardson* 403 U.S. 672 (1971).

These three prongs "constitute a convenient, accurate distillation of this Court's efforts over the past

decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws 'respecting the establishment of religion,' and thus to provide the proper framework of analysis for the issues presented . . . ," *Meek* v. *Pittenger*, 421 U.S. 349, 358 (1975). This Court has, however, cautioned that this test must not be viewed as setting the precise limits to the necessary constitutional inquiry but is to serve only as guidelines to identify instances in which the *objectives* of the establishment clause have been impaired. *Id.* at 358-59.

This Court has expressly prohibited the expenditure of government money in any amount for religious activity. *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1947); *Torcaso* v. *Watkins*, 367 U.S. 488, 492-93 (1961); *McGowan* v. *Maryland*, 366 U.S. 420, 443 (1961).

James Madison explained the necessity for this prohibition by declaring that "the same authority which can force a citizen to contribute threepence only of his property for the support of any one establishment may force him to conform to any other establishment." *Everson, supra* at 65-66 (appendix to dissenting opinion).

This Court, recognizing that the language of the religion clauses of the First Amendment is at best opaque, held that "[i]n the absence of precisely stated constitutional prohibitions, we must draw the line with reference to the three main evils against which the establishment clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activities.' " *Lemon* v. *Kurtzman, supra* at 612.

This Court has pinpointed several activities which the establishment clause is directed against. They include

the placement of the government's prestige behind a particular religion. *Engel* v. *Vitale*, 370 U.S. 421, 429-30 (1962), and the employment of the political machinery of the government to gain a preferred status for a religion or a belief. *School District of Abington Township* v. *Schempp, supra* at 222.

When a court, as did the District Court below and the Court of Appeals, finds that a challenged activity impairs one of the objectives of the establishment clause, that activity must be struck down regardless of the outcome of the tripartite guidelines. However, reference to the tripartite test also results in the invalidation of the City's activities and expenditures here-challenged, and the Court of Appeals properly so held.

Defendants in erecting a dais, the sole purpose for which was the supporting of a cross and an altar and the celebration of a Roman Catholic Mass by Pope John Paul II, failed to meet even one requirement of the three-pronged constitutional test.

A. The Structure, Which Was Designed, Constructed And Paid For By The City, Did Not Serve A Secular Purpose.

The District Court, after reviewing in some detail the nature of the facility constructed by the City for an acknowledged sectarian use, found as fact that the dais was designed, constructed, and used for a religious service and only incidentally for the secular purposes asserted by the City. Ample evidence in the record supports that finding. The intended and sole purpose of the dais was to support the altar at which a religious service was celebrated, in effect serving as a great outdoor cathedral complete with City-provided flowers. The church's eventual construction of the altar itself does not

change the express purpose behind Defendant's actions. Furthermore, the altar and dais were an integral part of the outdoor religious service. The altar could not stand without the platform anymore than a house could stand without a foundation. Similarly, the unique dais could serve no other purpose.

The City asserts that the nature of the event is not controlling and contends that the only reason for the City's involvement was for the purely secular purpose associated with a visiting dignitary. Such a contention misses the point of *Nyquist*. This Court in *Nyquist* clearly delineated between *secular* and *sectarian* purposes. There, this Court in reviewing the decision of *Board of Education* v. *Allen,* 392 U.S. 236 (1968), pointed out that in *Allen* this Court upheld a New York law authorizing the provision of *secular* textbooks for all children in grades seven through twelve attending public and non-public schools. This Court also briefly reviewed its previous decision in *Tilton* v. *Richardson, supra,* and noted that the Court had upheld federal grants of funds for the construction of facilities to be used for clearly *secular* purposes by public and non-public institutions of higher learning.

This Court in *Nyquist* stated: "These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above-cases illustrate." 413 U.S. at 775.

In *Nyquist* this Court further pointed out that *Tilton* drew the line most clearly. The Court observed that the federal grant program under attack in *Tilton* provided for carefully limited construction grants to col-

leges and universities. One clause of the federal statute in question provided that the government was entitled to recover a portion of its grant to a sectarian institution if the constructed facility were used to advance religion by, for instance, converting the building to a chapel or otherwise allowing it to be "used to promote religious interests." However, because the statute provided that the condition would expire at the end of 20 years, the facilities would thereafter be available for use by the institution for any sectarian purpose. Justice Powell observed:

> If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activity 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitation on their use. If the state may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.

Id. at 776-77.

In this case it was not the business of the City to build a structure of any size for the holding of a religious service. The Logan Circle papal appearance was strictly religious in character and content. Therefore the accommodation required by the free exercise clause was the permitted use of the park, not the expenditure of tax funds for the erection and construction of an outdoor cathedral at which the papal Mass was to be celebrated.

The question here is not whether the Pope is or is not head of state as well as a religious leader. The only question is whether the facility erected by the City was used for a secular or sectarian purpose. If the President

of the United States came to conduct a purely religious service, it would be equally impermissible for the City to build the facilities for such an activity. The true question is not who is the speaker, but what is the function being served.

That the Mass conducted at Logan Circle was in furtherance of a religious mission cannot be questioned. There cannot be an event more "subsumed in the religious mission" than a Mass celebrated by the head of the Roman Catholic Church, *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973); *Tilton* v. *Richardson, supra* at 672.

Regardless of the convoluted logic of the City, the fact remains, as the trial court aptly noted, "that the platform itself was not designed, constructed, or used for civil ceremony of welcome but was designed, constructed, and used for the celebration of Holy Mass by the Pope, assisted by bishops of the Catholic Church" (11a-12a).

B. The Structure Had A Primary Effect That Advanced Religion.

In addition to the purely sectarian *purpose* of the City's use of public funds, the primary *effect* of the expenditures was to advance the cause of the Roman Catholic Church specifically and religion generally. The City directly donated public funds, property, and time of City personnel to support religious worship services at Logan Circle, thus fostering the "three main evils against which the establishment clause was intended to afford protection: 'sponsorship, financial support and active involvement of the sovereign in religious activity.'" *Lemon* v. *Kurtzman, supra* at 612, quoting from *Walz* v. *Tax Commission,* 397 U.S. 664 (1970); *Tilton* v. *Richardson, supra* at 668.

Support in forms far less direct than that exhibited here have been held consistently unconstitutional. *See,* for example, *Lemon* v. *Kurtzman, supra* at 619, where government subsidies to primary and secondary non-public schools were forbidden because religion might be fostered.

The City has cited a number of cases where various types of programs might incidentally aid religion but in none of these cases did this Court sanction the grant of direct financial aid to a pervasively sectarian activity.

In *Hunt* v. *McNair, supra* at 743, this Court plainly stated:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

The City argues that this case involves a one-time event and implies that to violate the establishment clause the activity must be permanent. Appellant's Brief, pp. 11-12. The First Amendment command does not simply prohibit the government from establishing a national church or religion. Rather, the First Amendment commands that there shall be "no law *respecting* the establishment of religion" (emphasis supplied).

A law respecting the prescribed result is not always easily identifiable as one violative of the establishment clause. A given act might not establish a state religion or favor religion generally but nevertheless be one "respecting" that end in the sense of being a step that could lead to such an establishment and hence offend the First Amendment. *Lemon* v. *Kurtzman, supra* at 612.

The City's claim that the act complained of is transitory appears to be somewhat contradictory to another argument advanced by the City to the effect that it violates the free exercise clause of the First Amendment if the state will not provide the same services for a religious gathering as it would for a non-religious gathering of the same size and scope. If the Pope is entitled to have the facilities upon which he presides over a Mass paid for by funds from the public coffers, then using the same argument, any other large religious gathering under the sponsorship of some other church organization or religious leader would be entitled to the same tax-supported benefits. In making the determination of when to provide such benefits, the City would have to make judgments concerning the size and importance of religious services.

The self-perpetuating tendency of any form of government aid to religion has been a matter of concern running throughout establishment clause cases. This is illustrated in *School District* v. *Schempp, supra,* where this Court emphasized that it was "no defense to urge that the religious practices may be relatively minor encroachments on the First Amendment," for what today is a "trickling stream" may be a torrent tomorrow. 374 U.S. at 225. See also *Lemon* v. *Kurtzman, supra* at 624-25.

The expenditure of thousands of dollars of public funds of the taxpayers of the City of Philadelphia to aid in the holding of a religious service is constitutionally offensive in itself. But should the concept that all religious organizations, at least those large enough to command large crowds, have equal access to the public till become implanted in the law, the constitutional violation would become intolerable and would strike a heavy blow

against the establishment clause itself, with detrimental impact on the free exercise clause also. Such a legal doctrine would have continuing adverse ramifications on church-state relations long into the future.

The District Court, after analyzing the facts here present, felt constrained to hold that it had no alternative but to conclude that the use of the public funds had a primary effect of advancing religion (14a). The Court of Appeals ruled that the religious effect was both plain and primary (33a).

Even a finding that the City's action had some secular effect would not insulate the City from the prohibition of the establishment clause. This Court has held that its "cases simply do not support the notion that a law found to have a 'primary effect' to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has a direct and immediate effect of advancing religion." *Committee* for *Public Education* v. *Nyquist, supra* at 783-84, n. 39.

The City also seeks to validate its religious giveaway project by claiming that it had to provide the dais for the Mass, the platform for the choir, the flowers, the public address system, and the chairs for police protection and to enhance the City's image before the media.

Even if it is determined that the City's actions had a secular purpose, which is denied, that action cannot stand when the act also aids or inhibits religion if the same secular ends may be attained by means not even incidentally affecting religion. *McGowan* v. *Maryland, supra* at 466-67 (Frankfurter, J., concurring). In this case the City, as a part of its granting of the use of the City park, could have regulated the manner of the park's

use, provided police protection, and required the Archdiocese to have provided at its own expense a dias for the papal visit. This would have provided security and no doubt would have been equally eye pleasing before the public media. As noted by the Court of Appeals, the City's design of the platform to include the cross and the advance of the funds for its construction are relevant to the purpose and effect of the City's overall action (32a).

C. The City's Actions Created Impermissible Entanglement Between City Government And Religion.

When the prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the approved religion is plain. *School District* v. *Schempp, supra* at 221. When government allies itself, as the City of Philadelphia did in this case, with one particular form of religion, the inevitable result is that it incurs "the hatred, disrespect and even contempt of those that hold contrary beliefs." *Engel* v. *Vitale, supra* at 431.

The facts in this case demonstrate that there was substantial contact between the City and the Church. It is apparent that the City went far beyond the minimal necessary contacts between church and state that may have been required to control problems of traffic congestion, public health, and safety as was permitted in *O'Hair* v. *Andrus,* 613 F.2d 931 (D.C. Cir. 1979). The record also bears out the Court's finding of divisiveness (35a).

D. The City Cannot Justify Its Actions By Taking Refuge In The Free Exercise Clause.

Support for the City's claim that the denial of the expenditure of public funds for the purpose of erecting a

platform to be used for a papal Mass is apparently erroneously based upon the decision of the Court of Appeals for the District Columbia in the recent decision of *O'Hair* v. *Andrus, supra.* That action arose from Pope John Paul II's planned visit to Washington, D.C., and dealt with an attempt to prevent the papal Mass being held on the Washington Mall. But, the *O'Hair* decision does not support the City's contention in this case. Public parks such as the Mall in the Nation's Capital or in Philadelphia's Logan Circle are public forums that both religious and secular organizations have a right to use subject to limited restrictions as to "time, place and manner." *Grayned* v. *City of Rockford,* 408 U.S. 104, 117 (1972)*; Cantwell* v. *Connecticut,* 310 U.S. 296, 304 (1940). Without doubt Logan Circle was an appropriate place for the holding of the papal Mass.

The Roman Catholic Archdiocese has a constitutional right of free speech and assembly and the free exercise of religion under the First Amendment to the United States Constitution to hold its religious service there subject to reasonable regulation as to matters of health and safety. It is quite another thing, however, to say that the Catholic Archdiocese's right to use the public forum carries with it the mandate that the public pay for the holding of the religious service or construct the edifice upon which the religious service was to be held. Such a holding would fracture the whole concept embraced in the religion clauses of the First Amendment. In *Everson* v. *Board of Education, supra* at 16, Justice Black stated: "[N]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, whatever form they may adopt to teach or practice religion."

The City bases its free exercise argument on the case of *Zorach* v. *Clauson,* 343 U.S. 306 (1952), and takes out of context the portion of Justice Douglas' opinion wherein he states: "We are a religious people whose institutions presuppose a Supreme Being." Mr. Justice Douglas, however, did not end his paragraph on the free exercise of religion at that point. He continues: "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education, nor use secular institutions to force one or some religion on any person." *Id.* at 314. Thus, the *Zorach* decision does not stand for the proposition that government must fund a religious exercise as part of its accommodation of free religious expression at a public forum.

Intervening Plaintiffs contend that the free exercise clause does not require government to pay for the erection of any religious facility, whether it be enclosed within a formal church or in the open air.

The free exercise argument here asserted by the City has been previously tendered to but rejected by this Court in *Committee for Public Education and Religious Liberty* v. *Nyquist, supra* at 788. The application of *Nyquist* to the contention of the City in this case is inescapable. Although the City had no right to deny the use of its public parks as a forum for the holding of a religious service, the City is required to maintain its neutrality and must not for public relations benefits or for other equally nonconstitutional reasons, take steps which can only be regarded as "advancing religion." The trial court was persuaded that the tax funds expended by the City were clearly an advancement of religion and therefore were a violation of the establishment clause (16a).

The City also seeks to rely on the decision of the Eighth Circuit in *Chess* v. *Widmar,* 480 F.Supp. 907 (W.D. Mo. 1979), No. 80-1048 (8th Cir., Slip. Op., August 4, 1980), *petition for certiorari granted,* 49 U.S.L.W. 3595. That case only decided that a public university cannot prohibit a student group from using university facilities to hold a religious service. As the Court of Appeals in the instant case observed, *Chess* did not hold that the university had a duty to erect a special facility for the student religious group (37a). *Chess* did not involve the grant of financial aid to religion. The record in *Chess* v. *Widmar* also does not reveal any involvement of the state in the religious activities of the religious group. Unlike in *Chess* the City here sought to provide a substantial and direct financial benefit to the Roman Catholic Archdiocese.

The City should find no comfort in the decision of this Court in *Walz* v. *Tax Commission of the City of New York, supra.* It is true that this Court there stated that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Id.* at 673. It is also true that in *Walz* this Court recognized that a tax exemption for churches constituted a permissible *indirect* economic benefit to religion. *Id.* at 674. The Court, however, was equally clear that "the grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

Walz is clear on the point that although the course of constitutional neutrality cannot be an absolute straight line, the basic purpose of the religion clauses "is to insure that no religion be sponsored or favored, none

commanded, and none inhibited." *Id.* at 669. The holding of the Court of Appeals is consistent with this basic constitutional purpose. A contrary holding would tilt government in the direction of religious sponsorship.

Zorach, supra at 312, suggests that "separation of church and state is not an independent principle, that the primary principle is that of religious liberty. The religion clauses of the First Amendment must be read together, and religious liberty is to be protected by the First Amendment against government action either establishing religion or prohibiting its free exercise. To have prohibited the use of Logan Circle for the saying of papal Masses or any other religious meeting would have been the unconstitutional use of governmental power prohibited by the free exercise clause. The financing of any part of those religious exercises, however, is equally unconstitutional as being the exertion of governmental power in respect of the establishment of religion.

CONCLUSION

It was a violation of the establishment clause of the First Amendment for the City to build a structure of any size for the holding of any religious service since the purpose of the assemblage at Logan Circle was purely religious. The cost of construction of the dais, the erection of the cross, and the beautification of the surroundings, all designed to focus upon the Mass itself, should have been a cost borne by the Roman Catholic Church.

It is now firmly established that a law may be "respecting an establishment of religion" even though its consequences are not to promote a "state religion." *Lemon* v. *Kurtzman, supra* at 612; *Committee for Public Education and Religious Liberty* v. *Nyquist, supra* at 771.

The record in this case shows total insensitivity by the City to Plaintiffs' First Amendment rights as well as the rights of others who did not seek legal redress but to whom the violation of the establishment clause may be equally offensive. The decision of the Court of Appeals holding the action of the City of Philadelphia to be in violation of the establishment clause is in keeping with this Court's precedents in the religion clauses area. To permit the expenditures made by the City of Philadelphia in this case would constitute a dangerous digression from well established First Amendment principles.

For the reasons above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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